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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No.

ROBERTO AYO-GONZALEZ,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

CUBAN VESSEL F-V E-82 HB,
Her Engines, etc., and FLOTA CAMARONERA DEL CARIBE,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Roberto Ayo-Gonzalez respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit to review its affirmance of his conviction of 16 U.S.C. § 1081 by the United States District Court for the Southern District of Texas. The Cuban Vessel F-V E-82 HB and its owner, Flota Camaronera Del Caribe, respectfully pray that a writ of certiorari issue to the same court to review its affirmance of the judgment of forfeiture also rendered by the district court.

Judgments and Opinions Below

The opinion of the Court of Appeals affirming on consolidated appeals the judgment of guilt against Ayo-Gonzalez and the judgment of forfeiture against Cuban Vessel F-V E-82 HB (hereinafter sometimes "Cuban Vessel E-82") is set out as Appendix A and is reported at 536 F.2d 652 (5th Cir. 1976). The judgments of affirmance are set out as Appendix B. The district court rendered no opinions. Its judgment of guilt is set out as Appendix C. Its judgment of forfeiture and accompanying findings of fact and conclusions of law are set out as Appendix D.

Jurisdiction

The judgments of the Court of Appeals affirming the district court's judgments of conviction and of forfeiture were entered on August 6, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. In *Ayo-Gonzalez* v. *United States:* May the master of a foreign vessel be held criminally liable consistent with 16 U.S.C. § 1081 or the due process clause of the Fifth Amendment for an offense carrying a maximum punishment of one year in prison and a $100,000 fine without regard to whether he acted culpably, if only negligently, in fishing within the prohibited zone?

2. In *Cuban Vessel F-V E-82 HB and Flota Camaronera Del Caribe* v. *United States of America:* May a foreign vessel be forfeited for fishing within the prohibited zone consistent with 16 U.S.C. § 1081 or the due process clause of the Fifth Amendment without regard to whether the owner or its agents were negligent?

Statutory and Constitutional Provisions Involved

16 U.S.C. §§ 1081, 1082, 1091 and 1092 are set out as Appendix E. The due process clause of the Fifth Amendment to the Constitution of the United States provides:

> "No person shall be . . . deprived of life, liberty or property without due process of law."

Statement of the Case

Ayo-Gonzalez was convicted on a criminal information charging that on August 2, 1975 he, the "Master of the Cuban Fishing Vessel E-82-HB, did engage in fisheries within the fisheries zone contiguous to the territorial sea of the United States approximately seven and one-half miles off Saint Joseph Island [Texas] in violation of Sections 1081, 1091 and 1082(a), Title 16, United States Code" (268).[1] At the consolidated bench trial, Ayo-Gonzalez having waived trial by jury, the United States was also awarded a judgment of forfeiture on a libel *in rem* which charged that the vessel engaged in the same acts as those charged in the criminal information (F1).[2] On consolidated appeals, the Court of Appeals affirmed both judgments.

16 U.S.C. § 1081 provides in relevant part:

> "It is unlawful for any vessel, except a vessel of the United States, or for any master or other person in

[1] The reference is to the record prepared for the Court of Appeals in *Ayo-Gonzalez;* where preceded by "F", the reference is to the record prepared for the Court of Appeals in *Cuban Vessel E-82.* If requested, petitioners will lodge copies of both records with the Court.

[2] In the forfeiture proceeding, Flota Camaronera del Caribe, an instrumentality of the Republic of Cuba, entered a limited appearance as claimant to the vessel.

charge of such a vessel, to engage in the fisheries within the territorial waters of the United States . . . or within any waters in which the United States has the same rights in respects to fisheries as it has in its territorial waters . . . ."

By 16 U.S.C. §§ 1091 and 1092 the United States has asserted "the same rights" to exclusive fishing within a zone nine miles in breadth contiguous to the territorial sea as in the territorial sea itself, traditionally defined as three miles from the shore. The master and the vessel were each found to have engaged in the fisheries within that "contiguous" zone.[3]

16 U.S.C. § 1082(a) provides that the master of the vessel "shall be fined not more than $100,000, or imprisoned not more than one year, or both." The district court sentenced Ayo-Gonzalez to one year unsupervised probation with the conditions that during his probation he not engage in commercial fishing and that he not enter the territorial limits of the United States (35a).[4] 16 U.S.C. § 1082(b) provides that the vessel "shall be subject to forfeiture". The district court ordered the vessel forfeited (41a).

The district court found Ayo-Gonzalez guilty simply and exclusively because he was the master of a foreign vessel which was found to be fishing within 12 miles of the United States' shore. The district court expressly rejected defendant's contention that some degree of personal culpability was required to subject him to criminal liability,

[3] Effective March 1, 1977, 16 U.S.C. §§ 1081-1094 will be superceded by "The Fishery Conservation and Management Act of 1976," P.L. 94-265, 94th Cong., 2d Sess. (April 13, 1976).

[4] "(a)" refers to the appendices hereto.

even if only negligence rather than higher degrees of *mens rea* such as purpose, knowledge or recklessness.[5]

The issue was presented to the district court by way of appropriate motions at each stage of the trial.[6] While shaped in consequence of the lower court's rulings excluding the issue, the record also raised for the trier of fact the question whether Ayo-Gonzalez acted without negligence.[7]

Pursuant to the normal practice of the Cuban fishing fleet (112-113), the E-82 fished with two other similar vessels under the direction of a larger, more sophisticated "mother ship," which alone had radar (192-193). The navigational equipment on board the E-82, an 82-foot shrimp boat with a crew of 9, consisted only of such relatively primitive instruments as a compass, a sextant, a chronometer, charts and almanacs (193). While at mid-sea, Ayo-Gonzalez, aged 22, was transferred to the E-82 to

[5] The district court stated:

"I don't think we get to that reasonableness. I don't think we get to that reasonably prudent man test in this case.

• • •

I just believe the government proved beyond a reasonable doubt that this ship, at the time it was apprehended by the Coast Guard, was somewhere in the neighborhood of eight miles from the nearest point of shore, which would bring it in violation of this statute.

And that is what I will find, and I so find the defendant guilty because he is the master. The statute says a master" (14a-15a).

[6] The defendant's contention was pressed by pre-trial motion to dismiss (11; 273); by motions for a judgment of acquittal at the close of the government's case (170-186) and upon the close of all the evidence (238-244); and by argument at the close of all the proof that if culpability was considered provable by a rebuttable presumption, it had been rebutted (236).

[7] Partial evidence on the culpability issue was incidentally adduced as a result of Ayo-Gonzalez contesting that the E-82 was within the 12 mile zone and, for that purpose, testifying as to the basis of his belief.

replace its master, who assumed command of the "mother ship" because the master of that vessel had fallen ill (192).

For much of August 1, 1975, the "mother ship" and the E-82 were at anchor together. The "mother ship" informed Ayo-Gonzalez that they were approximately 20 miles from shore. During the day, Ayo-Gonzalez also plotted a distance of approximately 20 miles from shore, using the sextant, chronometer and navigational charts aboard (194-198). Beginning fishing operations at 9:00 P.M., the "mother ship" informed Ayo-Gonzalez that she was going to chart a course of 225° and instructed him to follow (198). The E-82 did so for four hours at a speed of three miles per hour, which is normal fishing speed (199, 206). At 1:00 A.M. on August 2, the E-82 separated from the "mother ship" with its approval in order to try fishing in different waters.

Relying on the "mother ship's" navigation, Ayo-Gonzalez believed he was more than 12 miles from shore at the time of separation (203). "The mother ship was very close to me and the mother ship uses radar all the time" (203). In addition, more than a 12 mile distance from shore was shown on the E-82's nautical maps for the position that would be arrived at by proceeding from the supposed starting point on the course of 225° chartered by the "mother ship" for four hours at three miles per hour (200-203, 205). Leaving the "mother ship," Ayo Gonzalez purposefully adopted a course of navigation which would have guaranteed that he stay more than 12 miles from shore if he in fact was more than 12 miles out at that time (208).[8]

[8] Ayo-Gonzalez maintained a northeast course seaward of the axis he believed he had taken following the "mother ship" southwest. Accordingly, if the "mother ship" had stayed outside of the 12 mile limit, so would Ayo-Gonzalez on the return trip. He first sailed at 45° for an hour (which is the same axis heading northeast as the 225° heading southwest set by the "mother ship"), then 60° for an hour, then at 50° for an hour and, finally, back to 45° (205-206). Moreover, he maintained a speed of three miles per hour (206). Four hours later—at the time the E-82 was sighted by the Coast Guard—he necessarily would have been seaward of the axis he took southwest following the "mother ship" and, thus, more than 12 miles from shore.

The defendant believed he was well beyond the United States' contiguous zone at the time of seizure and had always been so (206; 216).

The Coast Guard's extremely sophisticated air and surface instruments determined otherwise.[9] As the Court of Appeals noted (8a, fn. 7), it may well have been that the "mother ship" miscalculated the distance from shore because its radar failed to pick up the low outlying islands from which the 12 mile limit is measured and instead showed only the more distant mainland. Or the "mother ship" might not have in fact pursued its indicated course of 225°. Whatever the cause of the error, however, a substantial question was raised as to whether Ayo-Gonzalez acted reasonably in relying upon the "mother ship" in the manner and circumstances indicated and otherwise acted free of negligence.

Reasons for Granting the Writ

1. The conviction of Ayo-Gonzalez squarely presents the issue of whether criminal liability carrying penalties as serious as a year's imprisonment may be imposed on the basis of "strict" or "absolute" liability. The district court ruled irrelevant and refused to consider whether Ayo acted

[9] The Coast Guard airplane employed two different systems based on the use of special radio signals emitted from shore (TACAN and VORTAC) as well as radar (120-147). The Coast Guard ship used radar and a fathometer (25).

with any degree of personal culpability, even if only negligence, or any defense of lack of negligence. The Court of Appeals affirmed, unequivocally rejecting the contention that negligence or some other degree of personal culpability is required because of the severity of the possible punishment (26a-27a).

This Court repeatedly and recently has recognized that imposition of "strict" liability for serious offenses would pose profound problems for our criminal and constitutional jurisprudence. See *United States* v. *Park,* 421 U.S. 658 (1975); *United States* v. *International Minerals and Chemical Corp.,* 402 U.S. 558 (1971); *United States* v. *Freed,* 401 U.S. 601, 612 (1971) (Brennan, J., concurring); *Morissette* v. *United States,* 342 US. 246 (1952). Impressive scholarly authority has concurred most emphatically in that assessment. See, for example, A. L. I., Model Penal Code § 2.02, Comment 140 (Tent. Draft No. 4, 1955); Packer, *Mens Rea and the Supreme Court,* 1962 Sup. Ct. Rev. 107. The House of Lords has also recently expressed itself to the same effect within the context of English jurisprudence. *Sweet* v. *Parsley,* 1970 A.C. 132 (House of Lords).

The concern arises from the deep roots "in the traditions and conscience of our people," *Rochin* v. *California,* 342 U.S. 165, 169 (1952) of the principle that moral blameworthiness—that is, conduct accompanied by a culpable state of mind—is necessary in order to subject an individual to criminal liability. This much at least was established by *Morissette* v. *United States, supra.* Canvassing the history of "the ancient requirement of a culpable state of mind," the Court found that:

> "[t]he contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."

Id. at 250. The principle, which found "unqualified acceptance" by English common law in the eighteenth century and ready pronouncement by nineteenth century commentators as well, took "deep and early root in American soil," at 250-252. It also persisted; as noted in *Dennis* v. *United States,* 341 U.S. 494, 500 (1951), "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American jurisprudence." *Morissette* continued the protection of this aspect of "the immunities of the individual," 342 U.S. at 263, by establishing certain principles of statutory construction, which was all that was necessary for resolution of that case.[10]

It is difficult to reconcile the place of *mens rea* in our traditions, as confirmed by *Morissette,* with the elimination of a culpability requirement when potentially substantial deprivations of liberty are at stake. Impressive authority strongly suggests that the reconciliation cannot be made consistent with due process of law, which embraces that which is "fundamental to the American scheme of justice," *Duncan* v. *Louisiana,* 391 U.S. 145, 149 (1968).[11] Reviewing the "limited class of offenses," *Morissette* v. *United States, supra* at 258, imposing "absolute" liability

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[10] Long before *Morissette,* the Court had expressed itself in a similar vein. See *Felton* v. *United States,* 96 U.S. 699, 703 (1878).

[11] This aspect of the due process clause has been phrased variously, *e.g.:* "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," *Powell* v. *Alabama,* 287 U.S. 45, 67 (1932); "basic in our system of justice," *In re Oliver,* 333 U.S. 257, 273 (1948); "necessary to an Anglo-American regime of ordered liberty," *Duncan* v. *Louisiana, supra* at 150, fn. 14.

which first emerged in this century, the *Morissette* Court itself emphasized that for these "public welfare offenses" "penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation," 342 U.S. at 256. More recently in *United States* v. *Park, supra,* this Court emphasized that its construction of the archtypical "public welfare" statute carrying serious penalties (the Food, Drug and Cosmetic Act, 21 U.S.C. § 331) preserved personal culpability as an element of fact necessary for conviction. In *Holdridge* v. *United States,* 282 F.2d 302 (8th Cir. 1960), Circuit Judge, now Mr. Justice Blackmun, expressly stated that the penalty being "relatively small", among other characteristics of "public welfare offenses", was essential for elimination of *mens rea* not to be "violative of the due process clause." *Id.* at 310. The *Holdridge* articulation of the governing distinctions was adopted by Mr. Justice Brennan in his concurring opinion in *United States* v. *Freed, supra* at 610, 613, fn. 4. Other courts, as well, have expressly recognized that *mens rea* is constitutionally required for serious, as distinguished from petty, offenses. See *United States* v. *White Fuel Corp.,* 498 F.2d 619, 623-24 (1st Cir. 1974); *United States* v. *Brown,* 453 F.2d 101, 108 fn. 8 (8th Cir. 1971); *Commonwealth* v. *Koczwara,* 397 Pa. 575, 155 A.2d 825 (Sup. Ct., Pa. 1959).[12] The drafters of the Model Penal Code have also spoken to the same effect. Declaring that the principle "is too fundamental to be compromised," A.L.I., MODEL PENAL CODE, § 2.02, Comment 140 (Tent. Draft No. 4 1955), they have required some form of *mens rea* as an essential

[12] Indeed, the distinction was early recognized by the state courts in the formative period of "absolute" liability offenses. See *Tenement House Department* v. *McDevitt,* 215 N.Y. 160, 168, 109 N.E. 88, 90 (1915) (per Cardozo, J.); *People ex rel Price* v. *Sheffield Farms Co.,* 225 N.Y. 25, 32-33, 121 N.E. 474, 477 (1918) (per Cardozo, J.); Sayre, *Public Welfare Offenses,* 33 Columb. L. Rev. 55, 77 (1933).

element of every offense other than "violations," which the Code, § 1.04(5), defines as an offense without the possibility of imprisonment and which does not give rise to "any disability or legal disadvantage," and which the Code further declares not to "constitute a crime."

The *Morissette* Court narrowly identified the *mens rea* which comports with our traditions—that the proscribed act be done intentionally or knowingly. However, greater latitude may be allowed the legislature in establishing "public welfare" offenses while still retaining the essential element of moral culpability. In *United States* v. *Park, supra,* the conviction was sustained on the basis of negligence. But this is the bare minimum. See *United States* v. *Freed, supra* at 613 (Brennan, J., concurring); A.L.I., MODEL PENAL CODE, § 2.02; Packer, *supra* at 143-145. The courts below countenanced the elimination of even negligence for a serious offense.

The Court of Appeals agreed that due process imposed limitations upon the elimination of personal culpability. It concluded the severity of the possible punishment was not among these solely because of its reading of several of this Court's decisions (26a-27a).[13] It was mistaken and the need to correct the erroneous assertion that this Court has adversely resolved the issue only adds additional impetus for review of its judgment. *United States* v. *Freed,* 401 U.S. 601 (1971) concerned the quite different issue

[13] The court correctly placed no reliance on the sentence finally imposed upon Ayo-Gonzalez. That punishment was in any event a substantial deprivation of liberty. More importantly, however, it has been settled that the maximum punishment possible upon conviction is alone relevant for constitutional adjudication. See *Duncan* v. *Louisiana, supra* at 159-162; *Baldwin* v. *New York,* 399 U.S. 66 (1970). Among other matters, the conviction, if not overturned, will support substantial prison sentences in other cases, as was noted in *United States* v. *Park, supra* at 682-3 (Stewart, J., joined by Marshall and Powell, JJ., dissenting).

of whether ignorance of the law is a defense to certain types of regulatory offenses.[14] No different was the issue in *United States* v. *Balint*, 258 U.S. 250 (1922), as was noted in *Freed, supra* at 564-65. *Williams* v. *North Carolina*, 352 U.S. 226 (1945) concerned the related issue of "mistaken notions about one's legal rights," 325 U.S. at 238. *United States* v. *Dotterweich*, 320 U.S. 277 (1943) at most approved the elimination of "consciousness of wrongdoing" but retained the requirement of some degree of culpability, if only negligence; the review of *Dotterweich* in *United States* v. *Park, supra*, dispels any doubts as to this, if any once existed.[15]

The Court of Appeals was by no means oblivious of the need for some requirement of culpability. Having rejected the need for a "showing of negligence" (30a) to the satisfaction of the trier of fact, the court reasoned that due

[14] Indeed, Justice Douglas, author of the *Freed* opinion, noted for the Court in *United States* v. *Int'l. Minerals and Chemical Corp.*, 402 U.S. 558 (1971):

> "Here as in *United States* v. *Freed*, 401 U.S. 401, which dealt with the possession of hand grenades, strict or absolute liability is not imposed; knowledge of the shipment of the dangerous materials is required. The sole and narrow question is whether 'knowledge' of the regulation is also required. It is in that narrow zone that the issue of *'mens rea'* is raised."

Id. at 560.

That ignorance of the law might be rejected as an excuse and a requirement of culpability nonetheless maintained is readily apparent from our criminal jurisprudence. *Mens rea* is the rule, not the exception, *Dennis* v. *United States, supra* at 500, and ignorance of the law is only rarely allowed as a defense. Similarly, the MODEL PENAL CODE requires some degree of culpability for all serious offenses, § 2.02(1), but not knowledge of illegality, § 2.02(9).

[15] The *Morissette* Court as well rejected a broad reading of *Dotterweich* or even *Balint*, expressly limiting its approval of those cases to the "conclusions" reached in the "circumstances" presented. *Morissette* v. *United States, supra* at 260.

process nonetheless was satisfied by its own conclusion that the presumptions it perceived to underlie the statute are irrebuttable: that it is not unreasonable "to expect and require a ship's captain to know where he is" (26a) and that "proof that a defendant is the 'master or other person in charge of' a fishing vessel necessarily also establishes that he had the authority and responsibility to insure compliance with the law" (31a). In the court's view, this conclusion of law made irrelevant any factual issue in this or any other case other than that the defendant was the "master" of the vessel within the meaning of the presumption—that is, that he "was acting on his own when the violation occurred" and not under the immediate direction of superiors (31a, fn. 24).

The court's adoption of an irrebuttable presumption of negligence only serves to raise additional and equally grave difficulties. The court believed such an irrebuttable presumption is appropriate in the circumstances addressed by the instant statute, even though it would not be in circumstances such as were addressed in *United States* v. *Park, supra*. However, irrebuttable presumptions of essential elements of fact have never before been approved when serious criminal penalties, or even other substantial deprivations of liberty or property, are at stake. *Weinberger* v. *Salfi*, —— U.S. ——, 95 S. Ct. 2457, 2476 (1975).[16]

Nor is there any reason to reconsider that fundamental principle in these circumstances. The Court of Appeals

[16] See also, for example, *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974); *Vlandis* v. *Kline*, 412 U.S. 441 (1973); *Stanley* v. *Illinois*, 405 U.S. 645 (1972).

Quite different would be a *rebuttable* presumption based simply upon the defendant being the master of a vessel fishing within the prohibited zone. *United States* v. *Park, supra* at 673, apparently approves such an approach to proof of culpability. See also, for example, *Barnes* v. *United States*, 412 U.S. 837 (1973).

notwithstanding, it cannot be said with the absolute certainty which alone might suffice that whenever a vessel is within the prohibited zone it is there because of its master's culpable conduct. Neither we nor anyone can conceive of all the possible circumstances that might result in a transgression, a fact which itself undermines any claim of certainty. We can conceive of numerous circumstances, however, which would pose close questions. Just as the president of a corporation, the master of a vessel has "no choice," *United States* v. *Park, supra* at 677, but to rely on others and to rely on the equipment supplied by others. The reliance may be reasonable by any standard of stringency, all appropriate precautions may be taken and yet the proscribed occurrence may nevertheless occur. Further, it has been especially noted in the context of *mens rea* that "juries are not bound by what seems inescapable logic to judges." *Morissette* v. *United States, supra* at 276; *United States* v. *Park, supra* at 683, fn. 3 (Stewart, J., joined by Marshall and Powell, JJ., dissenting).

While the Court of Appeals' assertion of certainty is untenable, it may be appropriate to conclude that the prohibited occurrence generally does not occur without the master having been at least negligent. As for other "public welfare" offense, a conclusion to that effect might sustain the elimination of culpability provided the possible punishment is not substantial. Where the penalties can only be slight, due process may not necessarily preclude the legislature from weighing more heavily the administrative and other "difficulties of individual determinations", *Weinberger* v. *Salfi, supra* at 2476, than the principle that "it is far worse to convict an innocent man than to let a guilty man go free." *In Re Winship,* 397 U.S. 358, 372 (1970) (Harlan, J., concurring). Such appears to have been the original justification for "absolute" liability in "public welfare" offenses, where typically a regulatory

scheme is dependent upon a large number of cases being litigated summarily (*e.g.,* housing code violations). See Sayre, *Public Welfare Offenses, supra* at 72; A.L.I., MODEL PENAL CODE, § 2.02, Comments 140 (Draft No. 4 1955); Nat'l. Comm. on Reform of Federal Criminal Laws, WORKING PAPERS 130 (1970). For serious criminal offenses and other substantial deprivations, however, the principle has hitherto been absolute that the balance must be struck the other way and that "individual determinations" accordingly are required. *In Re Winship, supra; Weinberger* v. *Salfi, supra* at 2476. Similarly, where the penalties are slight, the constitutional right to trial by jury (or by the substitute trier of fact) on each element of fact and related procedural rights are not implicated. But where the possible penalties are substantial, those rights are seriously drawn into question by an irrebuttable presumption of *mens rea.* See *Morissette* v. *United States, supra* at 273-276; *Turner* v. *United States,* 396 U.S. 398, 425-434 (1970) (Black, J., dissenting).

Though of subsidiary importance, the Court of Appeals' treatment of two additional "factors" placed into its "crucible" (17a) require brief comment. First, the court asserted without explanation that conviction for unlawfully fishing within the United States' contiguous zone would not greatly injure the offender's reputation (27a). It has been this Court's perception that the social stigma attached to the conviction of any crime branded as serious by its maximum penalties is a "certainty" and itself a substantial deprivation of a liberty interest of "transcending value." *In Re Winship, supra* at 363-64. Scholarly authority has been to the same effect.[17] Second, the court asserts that

[17] See A.L.I., MODEL PENAL CODE, § 2.02, Comments 140 (Draft No. 4, 1955). Professor Wechsler has also stated:

"Preventive purpose notwithstanding, it is the distinctive feature of the penal law that it condemns offenders as wrong-

prosecutions would be "extremely difficult if the government had to prove willfulness or even negligence" (25a). The "commentator" relied upon by the court, however, only notes the difficulty of proving "willfulness" (25a, fn. 21). Nor is there any apparent reason why negligence would be an insurmountable obstacle to enforcement, particularly if it is the defendant who must come forward. *Cf., United States* v. *Park, supra.*[18]

2. The Court of Appeals construed 16 U.S.C. § 1081 as imposing "absolute" liability even though it conceded that a congressional "intent to impose absolute liability does not *conclusively* appear. . . ." (25a) (court's emphasis.) In the court's view, it was sufficient that "there is pervasive evidence to that effect, and we find no persuasive indications in the legislative history to require some form of *mens rea*" (25a). Petitioners disagree that there is even "persuasive evidence" of a congressional intent to impose "absolute" liability and believe a full review of the legislative history shows that Congress focused its concern on the intentional violator, gave only passing thought to the negligent violator and no thought whatsoever to non-

doers, marshalling the formal censure of conviction and coercive sanctions on this ground. This is not a feature of the system that is open to manipulation or can really be reconstructed in our time."

Wechsler, *Codification of Criminal Law In The United States: The Model Penal Code,* 68 Columb. L. Rev. 1425, 1434 (1968).

[18] Of course, conviction is inevitably made more difficult to some degree whenever *mens rea* is required, as was noted in *Morissette* v. *United States, supra* at 259. However, it is extraordinary difficulties of proof, so that a statute might be rendered a "nullity", *United States* v. *Greenbaum,* 138 F.2d 437, 438 (3d Cir. 1943), that are advanced as justification for relaxing the degree of culpability required, as in *Greenbaum,* or eliminating it altogether for offenses carrying only minor penalties.

negligent conduct.[19] However, it is the Court of Appeals' approach to the statute's construction which presents an issue of importance beyond this particular statute or its repeal effective March 1, 1977. Only a rule of construction that the legislative intention to impose "absolute" liability must indeed "conclusively appear" is adequate, given the place the culpability requirement occupies in our criminal and constitutional jurisprudence. See *Morissette* v. *United States, supra; Government of Virgin Islands* v. *Rodriguez,* 423 F.2d 9, 14 (3d Cir. 1970); *Taussiq* v. *McNamara,* 219 F.Supp. 757 (D.D.C. 1963), *cert. den.* 379 U.S. 834; *People* v. *Hernandez,* 39 Cal. Reptr. 361, 393 P.2d 673 (Sup.Ct., Calif. *en banc* 1964). *Cf. Sweet* v. *Parsley,* 1970 A.C. 132 (House of Lords).

3. In the forfeiture action, the district court ruled irrelevant whether the E-82's "engag[ing] in the fisheries" within the contiguous zone was due to the negligence of the owner or its agents. The Court of Appeals affirmed, apparently applying its analysis of the *mens rea* issue in the criminal action (32a).

The same provision, 16 U.S.C. § 1081, defines the "unlawful" act which results both in the forfeiture of the vessel, § 1082(b), and the conviction of its master, § 1082 (a). The judgment of forfeiture, no less than the conviction of the master, raises the issue of whether it is permissible to construe § 1081 as establishing "absolute" liability even though a congressional "intent to impose absolute liability does not *conclusively* appear" (25a) (court's emphasis). Forfeiture of a vessel is a substantial deprivation of an

[19] There are a few references in the legislative reports to "innocent or willful encroachments," one of which is quoted by the Court of Appeals (21a). In context, the term "innocent" stands in contradistinction to "willful", not negligent, conduct and is used interchangeably with "careless" in the same report.

interest protected by the due process clause. Its imposition without any degree of culpable conduct is both anachronistically harsh for our modern jurisprudence and of questionable constitutionality. See *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). Given its equal place as a penalty in the instant statute, the forfeiture is also decidedly in the nature of a criminal penalty.[20] Similarly, the same issue is presented by both the judgment of forfeiture and the criminal conviction as to whether there is even "persuasive evidence" (25a) to support the Court of Appeals' construction of § 1081.

The exclusion of negligence as irrelevant also squarely raises significant constitutional issues. In *Calero-Toledo* v. *Pearson Yacht Leasing Co., supra,* this Court found both the historic and modern justification for the institution of forfeiture to lie in its being a "penalty for carelessness," 416 U.S. at 681, 686 and an inducement "to exercise greater care," 416 U.S. at 688. That justification sustained the forfeiture even though the owner was not intentionally involved in the unlawful activity or aware of its existence. 416 U.S. at 689. But the result would be different, the Court strongly suggested, if the owner had acted without negligence, that is, "had done all that reasonably could be expected to prevent the proscribed use of the property; for, in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive." 416 U.S. at 689-90. Whatever the relative ease of proving (or disproving) negligence, this reasoning is as fully applicable to the owner which itself operates the vessel as to the owner in *Calero-Toledo,* which leased it to others.

[20] The criminal nature of forfeitures generally has been noted. See *United States* v. *U. S. Coin and Currency,* 401 U.S. 715, 718 (1971); *Plymouth Sedan* v. *Pennsylvania,* 380 U.S. 693, 700 (1965); *Boyd* v. *United States,* 116 U.S. 616, 634 (1886).

Presumably the Court of Appeals upheld the forfeiture on the basis of the irrebuttable presumption of negligence it applied to the criminal conviction. The Court of Appeals' reasoning is equally unacceptable in both instances. When substantial deprivations of liberty or property are at stake, due process requires individual determinations of essential elements of fact. See, for example, *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (1974); *Dept. of Agriculture* v. *Murry,* 413 U.S. 508 (1973); *Vlandis* v. *Kline,* 412 U.S. 441 (1973); *Stanley* v. *Illinois,* 405 U.S. 645 (1972); *Bell* v. *Burson,* 402 U.S. 535 (1971); *Heiner* v. *Donnan,* 285 U.S. 312 (1932).[21]

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: October 5, 1976

[21] Clearly inappropriate here is the tolerance of irrebuttable presumptions which may exist when social welfare or other statutory benefits are at stake. See *Weinberger* v. *Salfi, supra.* The deprivation is of an interest enjoying "constitutionally protected status," *Weinberger* v. *Salfi, supra* at 2470, that is, "property" in the original and strict sense.

APPENDICES

APPENDIX A

OPINION OF THE COURT OF APPEALS

UNITED STATES of America,
Plaintiff-Appellee,

v.

Roberto AYO-GONZALEZ,
Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,

v.

CUBAN VESSEL F-V E-82HB, her engines, etc., in rem., et al.,
Defendants-Appellants.

Nos. 75-3297 and 75-3873.

United States Court of Appeals,
Fifth Circuit.

Aug. 6, 1976.

The master and owner of a Cuban fishing vessel appealed from a judgment of the United States District Court for the Southern District of Texas, at Houston, John V. Singleton, Jr., J., convicting the master and forfeiting the vessel for illegally fishing in the contiguous fishing zone of the United States. The Court of Appeals, Gewin, Circuit Judge, held that any failure to give Miranda warnings to the captain was harmless error and that proof of culpability or fault was neither statutorily nor constitutionally necessary to sustain the captain's conviction or the vessel's forfeiture.

Affirmed.

1. Criminal Law ⇐1169.12

In view of other evidence of identity of captain of Cuban fishing vessel charged with illegally fishing in contiguous fishing zone of the United States, any failure of authorities to inform captain of his Miranda rights before asking him to identify himself as captain resulted, at most, in only harmless error. 16 U.S.C.A. § 1082(a).

2. Constitutional Law ⇐258(1)

Constitutional requirement of due process is not violated merely because mens rea is not required element of prescribed crime.

3. Fish ⇐9

Statute prohibiting foreign vessels from fishing within contiguous fishing zone of United States is not based on any common-law offense, but is regulatory measure designed to protect both commercial fishing industry and marine wildlife; it is typical malum prohibitum offense. 16 U.S.C.A. §§ 1081, 1082, 1091, 1092.

4. Fish ⇐13(1), 16

Proof of culpability or fault was neither statutorily nor constitutionally necessary to sustain conviction of captain of Cuban fishing vessel for illegally fishing in contiguous fishing zone of the United States; proof of culpability or fault was likewise unnecessary in action for forfeiture of fishing vessel itself. 16 U.S.C.A. §§ 1081–1094, 1081, 1082, 1082(a, b), 1091, 1092.

Michael Krinsky, Eric Lieberman, New York City, G. Rudolph Garza, Jr., Corpus Christi, Tex. (Court-appointed), for defendants-appellants.

Edward B. McDonough, Jr., U.S. Atty., Jack Shepherd and James R. Gough, Asst. U.S. Attys., Houston, Tex., Peter R. Taft, Asst. Atty. Gen., Bruce C. Rashkow, Ralph J. Gillis, U.S. Dept. of Justice, Washington, D.C., Robert Darden, Asst. U.S. Atty., Houston, Tex., for plaintiff-appellee.

Appeals from the United States District Court for the Southern District of Texas.

Before GEWIN, GODBOLD and SIMPSON, Circuit Judges.

GEWIN, Circuit Judge:

These consolidated cases present for our review the conviction of Roberto Ayo-González, as master of the Cuban fishing vessel E–82HB, for illegally fishing in the contiguous fishing zone of the United States; and the judgment of forfeiture awarded the United States on a libel *in rem* charging the vessel with the same illegal act,[1] in violation of 16 U.S.C. §§ 1081, 1082, 1091, 1092.

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1. Flora Camaronera del Caribe, an instrumentality of the Republic of Cuba, entered a limited appearance in the district court as claimant to the vessel.

Section 1081 provides in pertinent part:

> It is unlawful for any vessel, except a vessel of the United States, or for any master or other person in charge of such a vessel, to engage in the fisheries within the territorial waters of the United States . . . or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters . . . .

By sections 1091 and 1092, the United States established a fishing zone nine nautical miles in breadth, contiguous to the traditional three-mile territorial sea, in which zone it asserts "the same exclusive rights" to fishing as in the territorial sea.[2] Section 1082 establishes penalties for violations.[3]

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2. § 1091. Establishment; fisheries rights:

> There is established a fisheries zone contiguous to the territorial sea of the United States. The United States will exercise the same exclusive rights in respect to fisheries in the zone as it has in its territorial sea, subject to the continuation of traditional fishing by foreign states within this zone as may be recognized by the United States.

§ 1092. Description of boundaries:

> The fisheries zone has as its inner boundary the outer limits of the territorial sea and as its seaward boundary a line drawn so that each point on the line is none nautical miles from the nearest point in the inner boundary.

3. Section 1082 provides in pertinent part:

> (a) Any person violating the provisions of this chapter shall be fined not more than $100,000, or imprisoned not more than one year, or both.

In the district court, Ayo waived trial by jury, and the criminal and *in rem* actions were consolidated for a bench trial. The judge overruled a defense suppression motion based on alleged violation of *Miranda*[4] rights, and rejected the contention that some form of mens rea[5] must be proved to sustain a conviction. He ordered the vessel forfeited and found defendant Ayo guilty, sentencing him to one year unsupervised probation, with the conditions that during his probation Ayo not engage in commercial fishing and that he not enter the territorial limits of the United States. Before this court, appellant Ayo contends that the trial court committed reversible error in denying his suppression motion. It is argued on behalf of both Ayo and the vessel that mens rea is required to establish liability, or, if not, that section 1081 is unconstitutional. We affirm.

> (b) Every vessel employed in any manner in connection with a violation of this chapter including its tackle, apparel, furniture, appurtenances, cargo, and stores shall be subject to forfeiture and all fish taken or retained in violation of this chapter or the monetary value thereof shall be forfeited. For the purposes of this chapter, it shall be a rebuttable presumption that all fish found aboard a vessel seized in connection with such violation of this chapter were taken or retained in violation of this chapter.

4. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

5. The term "mens rea" is used in this opinion to refer to any degree of culpability, including negligence.

I

In the pre-dawn hours of August 2, 1975, crewmen aboard the United States Coast Guard Cutter *Point Baker*, which was on fisheries patrol out of Port Aransas, Texas, sighted the Cuban vessel E–82HB, an 82-foot shrimp trawler, fishing within the twelve-mile limit. Special Agent Velasco of the National Marine Fishery Service, who was on the *Point Baker*, directed the officer in charge to attempt to stop the Cuban vessel by using the cutter's flashing blue light, spotlight, and siren, and finally by cutting in front of her, but the vessel continued to trawl. Velasco then obtained a loud hailer and informed the Cubans in Spanish that they were fishing in United States waters in violation of the law and that they must stop engines and drop anchor. Still the vessel continued trawling, so Velasco repeated the above warning a second and a third time, whereupon a man appeared at the side of the Cuban boat and called out that he could not stop because his fishing gear was in the water. After the gear was pulled in, the vessel dropped anchor.

An attempt was made to board the Cuban vessel by jumping from the bow of the *Point Baker* to the stern of the E–82. At this point, defendant Ayo appeared at the rail of the Cuban vessel and requested that agent Velasco speak to his flotilla commander. Velasco told Ayo that the cutter did not have the necessary frequency, and that if Velasco were to talk to the flotilla

commander, he would have to use Ayo's radio; Ayo indicated that that would be acceptable. Velasco then asked Ayo if he was the captain, and Ayo answered affirmatively.[6]

Because of rough seas, this method of boarding proved too dangerous, so a small boat was launched from the *Point Baker* with a boarding party of four, and the Cuban boat was boarded at 7:00 a. m. The crew was already gathered at the stern of the trawler, and Velasco said to them, in Spanish, "I want to speak to your captain," at which point Ayo stepped forward and said he was the captain; two crew members nodded in agreement. When Velasco asked Ayo for identification, he explained that he usually served as captain of a different vessel; he had been transferred to the E–82 at sea, and had left his identification on the other ship.

Velasco and Ayo proceeded to the pilot house, where Velasco again identified himself and the boarding party, and read Ayo his *Miranda* rights. Ayo said that he understood his rights and wanted to speak. He told Velasco that he had very poor navigational equipment, and that he depended for navigation on a larger boat, which had radar; the E–82 had no radar, but it did have a chronometer, fathometer, sextant, compass, tables, and charts. Velasco examined Ayo's navigational aids, and then al-

6. Velasco's testimony on this point is set out in footnote 10, *infra*.

lowed Ayo to radio his flotilla commander. The commander requested that Velasco speak with him to try to reconcile the situation, but Velasco declined.

At the trial, Ayo testified that he had followed his "mother ship," which had radar, until about 1:00 a. m. on August 2, and then had separated from her and followed a course that he thought would keep him beyond the twelve-mile limit; he stated that he knew it was illegal to fish within twelve miles of the coastline. When Ayo radioed the mother ship after the boarding, he was informed that his position was 14.2 miles from the coast.[7]

The position of the Cuban vessel was checked through numerous fixes taken by the *Point Baker*'s navigator. In addition, a Coast Guard aircraft confirmed the position. All checks indicated that the vessel was approximately eight miles from St. Joseph Island on the Texas coast. In addition to the catch of marine life in the trawl nets, which were pulled in just before the boat dropped anchor, the boarding party found seven baskets of headed shrimp on board.

II

[1] For purposes of a section 1082(a) criminal prosecution, there are four ele-

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7. There was some indication in the testimony that the mother ship's radar might not have picked up St. Joseph Island, which could have led to the belief that the E–82's position was outside the twelve-mile limit. In fact, although she was some fourteen miles from the mainland, she was approximately eight miles off St. Joseph Island, and thus within the contiguous zone.

ments of the offense created by section 1081: (1) that the defendant be the "master or other person in charge of" (2) a foreign vessel; and (3) that the vessel be "engag[ing] in the fisheries" (4) within the territorial waters of the United States or the nine-mile contiguous fisheries zone.[8] At the consolidated trial below, it was undisputed that the Cuban boat was a foreign vessel and that it was fishing, and the location of the vessel within the twelve-mile limit, although contested, was clearly established by the prosecution. As to the remaining element, the identity of Ayo as the "master," appellant contends that this was proved only by means of a statement obtained in violation of Ayo's *Miranda* rights.

Velasco testified that after the ship was boarded, he addressed the assembled crewmen, of whom there were nine, and stated that he wanted to speak to the captain. In response, Ayo stepped forward, two of the crew members nodded in agreement, and Ayo then affirmed verbally that he was the captain. Concededly, Velasco did not read the *Miranda* warnings to all of the crew before asking for the captain. Therefore, appellant argues, this evidence was imper-

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8. Whether some degree of culpability is a fifth element is discussed in part III, *infra*.

missibly obtained and may not be considered on the question of identity. It is asserted that without this testimony, the government failed to prove an essential element. The argument is that the first statement by Ayo that he was the captain, made at the time of the unsuccessful boarding attempt, was not sufficiently trustworthy in and of itself, and that any incriminating actions or statements made by Ayo after receiving his *Miranda* rights were fatally tainted by the impermissibly obtained admission. We disagree.

Obviously, this case does not present the typical *Miranda* situation. Under ordinary circumstances, no *Miranda* question would arise concerning the propriety of an investigating officer establishing the identity of a suspect. The distinguishing factor here, of course, is that the identity of the defendant as master of the offending vessel is itself an essential element of the crime. Were we to find a *Miranda* violation here, the inevitable result would be that the Coast Guard (or other appropriate law enforcement agency) would be required, upon stopping a foreign vessel suspected of violating section 1081, to assemble all those on board the ship, read to them the *Miranda* warnings, and determine that all understand their rights, before attempting to ascertain who is in charge of the vessel. Perhaps it may be argued that such a result is dictated by the rationale of *Miranda* and subsequent cases. On the other hand, in charting a course designed to reflect constitutional policy, the courts are

well-advised to accord due regard to the twin moorings of common sense and realism. *Cf. United States v. Ventresca*, 380 U.S. 102, 108, 85 S.Ct. 741, 745, 13 L.Ed.2d 684, 689 (1965).

We have determined that a resolution of this particular point is unnecessary on the facts of this case. In a recent decision of this Circuit, Chief Judge Brown examined "[t]he distinction between the genus of unlawful confessions and the species of involuntary or coerced unlawful confessions . . . ." *Smith v. Estelle*, 527 F.2d 430, 431 (5th Cir. 1976) (on petition for rehearing and rehearing en banc). He noted, with exhaustive citation of authority, "the principle that confessions—unlawful but not involuntary—admitted into evidence but obtained without having given the warnings required by *Miranda* are subject to the harmless error rule." *Id.* at 432; *accord*, *Null v. Wainwright*, 508 F.2d 340 (5th Cir.), *cert. denied*, 420 U.S. 970, 95 S.Ct. 1964, 44 L.Ed.2d 459 (1975). Our careful review of the record herein, including a reading of the entire trial transcript, convinces us that, even assuming *arguendo* that the challenged testimony was erroneously admitted, the error was harmless beyond a reasonable doubt.[9] Agent Velasco had already identi-

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9. *See Null v. Wainwright, supra* at 343:

> If, upon its reading of the trial record, the appellate court is firmly convinced that the evidence of petitioner's guilt was overwhelming and that the trier of fact would have reached the same result without the tainted evidence, the conviction will stand.

fied Ayo as the captain, prior to the boarding of the trawler, by virtue of their conversation at the time of the initial, unsuccessful boarding attempt.[10] After his rights were explained to him, Ayo immediately waived them and was, in fact, eager to cooperate in an attempt to rectify the situation. He explained to Velasco his navigational problems, and several times requested that Velasco speak with the flotilla commander. On Velasco's request, Ayo took the agent to his cabin, which bore the designation "Captain" over the door, and showed him his log books and charts. It is

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10. Velasco's testimony was as follows:

Q [by defense counsel] Before speaking to the assemblage you had not spotted him out in your mind as the defendant—as the captain, rather?

A He had already admitted tc me being captain before we ever boarded, yes, sir.

Q Before you boarded the ship?

A Yes.

Q When was that?

A That was whenever we were attempting to board from the *Point Baker* and after we had a slight collision with him, we were backing away, and he wanted me to raise his flotilla commander on the 2670 frequency, and I told him that I couldn't because we didn't have that frequency; it wasn't within our capabilities to tune it in. And as we were backing away I told him that if I were to talk to his flotilla commander, I would have to use his radio. And he said, fine. And I asked him, are you the captain? Am I talking to the captain? And he said, yes, I'm the captain.

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appropriate to note that this case was tried by the court sitting without a jury and, as we said in a recent case involving the same question, "[s]trict evidentiary rules of admissibility are generally relaxed in bench trials, as appellate courts assume that trial judges rely upon properly admitted and relevant evidence." *Null v. Wainwright, supra* at 344. Viewing all the facts and circumstances, we cannot conclude that the admission of Velasco's testimony concerning Ayo's pre-warning identification of himself was reversible error.

Q Now, did you have any doubts about whether he was the captain from that discussion?

A No, sir.

Appellant contends that subsequent questioning demonstrated that Velasco did doubt the first identification. Read in context, however, it is our conclusion that the later identification, subsequent to the boarding, was essentially a pro forma, procedural matter. The transcript continues:

Q If you knew he was the captain, why was it necessary for you to ask for the captain to step forward?

A Because I didn't want any mistake to be made that he might not have been the captain. I wanted to be absolutely positive that he was the captain.

Q So the purpose of your asking that was to make sure he was the captain?

A That's correct.

Q Because you thought it was necessary, for a criminal action, for you to be positive that he was the captain?

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III

Appellants' further contend that the court below erred in refusing to consider any form of culpability, including negligence, as an element of a section 1081 offense.[11] They argue that the substantial penalties prescribed; the resemblance of the offense to the ancient crimes of criminal trespass and poaching, which historically required mens rea; and the statute's legislative history all indicate that Congress intended the statute's ambit, at its broadest, to reach negligent conduct, but not innocent encroachments. If the statute

A As I understand it, I had to make sure that he was the captain so that we could go about the procedures in establishing the violation and the seizure. To speak with the crew member, just, it wouldn't have been according to procedures, standard procedures.

Q You had a doubt that he was the captain at the time that you boarded the ship? Is that correct?

A I had already asked him at one time if he was the captain and he said yes.

Q And you had a doubt and you wanted further proof? Is that correct?

A That's right. I wanted to see his captain's papers.

11. The court concluded that the statute was essentially regulatory, see *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952), and that no form of intent need be proved to establish a violation. During arguments by counsel at the close of the case the court stated:

> I don't think we get to that reasonableness. I don't think we get to that reasonably prudent man test in this statute.
>
> * * * * * *
>
> I just believe the government proved beyond a reasonable doubt that this ship, at the time it was apprehended by the Coast Guard, was somewhere in the neighborhood of eight miles from the nearest point of shore, which would bring it in violation of this statute.
>
> And that is what I will find, and I so find the defendant guilty because he is the master. The statute says a master.
>
> And I find that the government has met its burden relative to the in rem proceeding on the vessel.

does not require at least negligent conduct, it is argued, then it is unconstitutional as violative of due process.

[2] The construction of section 1081 is a question of first impression in this Circuit, and in fact, it appears that this issue has not been addressed in any reported decision. In examining these contentions, we take as our starting point the familiar precept that "[t]he existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Dennis v. United States*, 341 U.S. 494, 500, 71 S.Ct. 857, 862, 95 L.Ed. 1137, 1147 (1951). *Accord, Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952);[12] *see Smith v. California*, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959); *Lambert v.*

12. As Justice Jackson eloquently stated in *Morissette*:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will

California, 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957). But an equally well-established principle, although of more recent vintage, is that "[t]he constitutional requirement of due process is not violated merely because mens rea is not a required element of a prescribed crime." *United States v. Greenbaum*, 138 F.2d 437, 438 (3d Cir. 1943); *e. g., United States v. Freed*, 401 U.S. 601, 607–10, 91 S.Ct. 1112, 1117–1119, 28 L.Ed.2d 356, 361–63 (1971); *Williams v. North Carolina*, 325 U.S. 226, 238, 65 S.Ct. 1092, 1099, 89 L.Ed. 1577, 1586 (1945); *United States v. Balint*, 258 U.S. 250, 42 S.Ct. 301, 66 L.Ed. 604 (1922); *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 30 S.Ct. 663, 54 L.Ed. 930 (1910); *see Morissette v. United States, supra.* As Mr. Justice Douglas stated in *Lambert, supra*, "We do not go with Blackstone in saying that 'a vicious will' is necessary to constitute a crime, . . . for conduct alone without regard to the intent of the doer is often sufficient. There is wide latitude in the lawmakers to declare an offense and to exclude elements

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and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.

342 U.S. at 250–51, 72 S.Ct. at 243, 96 L.Ed. at 293–94 (footnotes omitted).

of knowledge and diligence from its definition." 355 U.S. at 228, 78 S.Ct. at 242, 2 L.Ed.2d at 231.

While the latitude is broad, it is not, of course, unlimited. When confronted with a challenge to a statute such as section 1081, which on its face appears to impose strict or absolute liability, the courts can turn to no precise and easily applied formula for a solution; many factors must go into the crucible. The Supreme Court in *Morissette* examined the historical background and development of a category of crimes that "depend on no mental element but consist only of forbidden acts or omissions"; these crimes have "very different antecedents and origins" from those offenses that were taken over from the common law. 342 U.S. at 252–53, 72 S.Ct. at 244, 96 L.Ed. at 295. They are frequently referred to as regulatory or public welfare offenses,[13] and their

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13. In *United States v. Dotterweich*, 320 U.S. 277, 280–81, 64 S.Ct. 134, 136, 88 L.Ed. 48, 51 (1943), the Court spoke of

> a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.

And in *United States v. Balint*, 258 U.S. 250, 252, 42 S.Ct. 301, 302, 66 L.Ed. 604, 605 (1922), it said, "Many instances of this are to be found in regulatory measures in the exercise of what is called the police power where the emphasis

number has steadily expanded over the years.[14] The Court discerned certain characteristics common to this class of offenses:

> Many of these offenses are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty. Many violations of such regulations result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize. While such offenses do not threaten the security of the state in the manner of treason, they may be regarded as offenses against its authority, for their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted. In this respect, whatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity. Hence, legislation applicable to such offenses, as a matter of policy, does not

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of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes . . . ."

14. *See United States v. Freed*, 401 U.S. 601, 607, 91 S.Ct. 1112, 1117, 28 L.Ed.2d 356 (1971): "The presence of a 'vicious will' or mens rea . . . was long a requirement of criminal responsibility. But the list of exceptions grew, especially in the expanding regulatory area involving activities affecting public health, safety, and welfare."

> specify intent as a necessary element. The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities. Also, penalties commonly are relatively small, and conviction does no grave damage to the offender's reputation. Under such considerations, courts have turned to construing statutes and regulations which make no mention of intent as dispensing with it and holding that the guilty act alone makes out the crime.

Id. at 255–56, 72 S.Ct. at 246, 96 L.Ed. at 296–97. *Morissette* teaches, however, that mere silence on the part of the drafters is not dispositive on the issue of whether some mental element is required. "Congressional silence as to mental elements in an Act merely adopting into federal statutory law a concept of crime already . . . well defined in common law and statutory interpretation . . . may warrant quite contrary inferences than the same silence in creating an offense new to general law, for whose definition the courts have no guidance except the Act." *Id.* at 262, 72 S.Ct. at 249, 96 L.Ed. at 299.

The question, then, is primarily one of legislative intent, but the result must comport with fundamental constitutional standards. In *Holdridge v. United States*, 282 F.2d 302, 310 (8th Cir. 1960), Judge, now Justice, Blackmun formulated a comprehen-

sive statement of relevant criteria that, while not a touchstone of constitutionality, is a helpful guide to resolution of the issues before us:

> [W]here a federal criminal statute omits mention of intent and where it seems to involve what is basically a matter of policy, where the standard imposed is, under the circumstances, reasonable and adherence thereto properly expected of a person, where the penalty is relatively small, where conviction does not gravely besmirch, where the statutory crime is not one taken over from the common law, and where congressional purpose is supporting, the statute can be construed as one not requiring criminal intent. The elimination of this element is then not violative of the due process clause.[15]

In applying the foregoing principles, we examine first the legislative history of the Bartlett Act.[16] Prior to the passage of section 1081 in 1964, there were no penalties for fishing by foreign vessels in United States territorial waters, i. e., within three miles from shore; the only recourse available was for the Coast Guard to escort offenders to the high seas. Congress found that situation unacceptable, especially in

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15. This articulation of the governing distinctions was approved by Mr. Justice Brennan, concurring in *United States v. Freed*, 401 U.S. 601, 613 n. 4, 91 S.Ct. 1112, 1120, 28 L.Ed.2d 356, 365 n. 4 (1971).

16. We employ this designation for sections 1081-94 of Title 16.

view of a dramatic increase in the number and sophistication of foreign fishing fleets operating off the United States coast and the frequency of violations of our territorial waters:[17] "Obviously, the limited scope of existing law fails to serve as a deterrent to *innocent or willful* encroachments in our territorial waters, thereby passively permitting foreign vessels to fill their vessels with fishery resources and in so doing deprive U.S. fishermen of the catch." House Comm. on Merchant Marine and Fisheries, H.R.Rep.No.1356, 88th Cong., 2d Sess. (1964), reprinted in 1964 U.S.Code Cong. & Admin.News, pp. 2183, 2184 (emphasis added). The committee also noted the national security implications of the problem, caused by the U.S.S.R.'s maintenance of "at least one trawler designed for intelligence collection off the east coast of the United States on a continuous basis." *Id.* at 2186.

As originally enacted, the maximum fine that could be imposed for a violation was $10,000. In 1970, Congress strengthened the penalties by, inter alia, increasing the maximum fine to $100,000. The Senate Commerce Committee, reporting on the

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17. The House Committee Report quoted the testimony of Senator Bartlett of Alaska, who stated that during 1963, "there were over 200 large, modern foreign fishing vessels off our Atlantic coast, while at the same time approximately 300 foreign vessels were in Alaskan waters, . . . operating along the coast at times within 15 miles or less of the mainland. Not infrequently, foreign fishing vessels strayed within our territorial waters." House

amendment, found that existing law, even with the addition in 1966 of the nine-mile contiguous zone,[18] was insufficient:

> Despite the additional protection afforded these resources, fishing by foreign vessels off our coastal waters continued to increase. . . .
>
> There is growing concern that valuable species of fish and marine life inhabiting the 12-mile zone off our shores are in danger of being seriously depleted, if not becoming extinct, owing to techniques employed by foreign fleets illegally fishing in such areas. . . . It . . . is apparent that the present law is an inadequate deterrent because of a lack of effective sanctions and enforcement or both. The risk of prosecution under existing law would seem to be more than offset by the potential remuneration to be gained from such illegal fishing activity.

Senate Comm. on Commerce, S.Rep.No.91–1320, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S.Code Cong. & Admin.News, pp. 4660, 4662–63.[19] The Committee also expressed "dissatisfaction with the level of the fines and penalties that have been imposed . . . ." *Id.* at 4663. To meet these problems, it recommended, among other measures, increasing the maximum fine to $100,000. It rejected, however, a proposal that would have set a mandatory minimum fine of $25,000. The Committee concurred in the view of the Departments of State and the Interior, which "expressed great concern over that part of the provision that provides for a mandatory fine. They contended that such a provision failed to take into consideration borderline violations, where the violator may be barely inside the fishery zone, or *unintentional violations* which may be caused by minor errors in navigation." *Id.* at 4664 (emphasis added). The Department of Transportation expressed much the same sentiment. *Id.* at 4670. Thus, it was apparently the view of everyone concerned that unintentional and intentional violators were equally liable un-

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Comm. on Merchant Marine and Fisheries, H.R.Rep.No.1356, 88th Cong., 2d Sess. (1964), reprinted in 1964 U.S.Code Cong. & Admin. News, pp. 2183, 2185. The Senator testified further that in the eight months preceding February, 1964, "16 foreign vessels have been officially sighted by the U.S. Navy or Coast Guard in territorial waters within our 3-mile limit off Alaska. My guess is that there have been numerous unreported instances also." *Id.*

18. 16 U.S.C. §§ 1091–92.

19. The Committee noted:

> As an example of this increasing pressure, the Bureau of Commercial Fisheries reported that the month of August 1969 alone, a total of 325 foreign fishing vessels were observed off the coast of New England. These included vessels belonging to the Soviet Union, Poland, East Germany, Rumania, Bulgaria, Israel, Iceland, Spain, and Norway.

Senate Comm. on Commerce, S.Rep.No.91–1320, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S.Code Cong. & Admin.News, pp. 4660, 4662. Compare these figures with those related in note 17, *supra*.

der the law, and that a mandatory minimum penalty provision would unwisely eliminate the flexibility in sentencing that otherwise could be used to reflect the relative culpability of the offender.[20]

The Committee also addressed itself to a proposal—now a part of section 1082(b)—to establish a rebuttable presumption that all fish found on board an offending vessel were acquired in violation of the Act. The Department of Justice had expressed some reservations concerning the factual basis for such a presumption. In response, the Committee noted that, "since commercial fishing vessels today are equipped with modern navigating equipment, the operators of the vessels know perfectly well where they are at all times, making it *most unlikely* that, with a legal catch on board, they would intrude in our zone by inadvertence." *Id.* at 4665 (emphasis added).

From the foregoing recount of the legislative history several points may be drawn. First, the Act is based on strong policy considerations; Congress sought to preserve the marine resources in our coastal waters, not only so that American fishermen might harvest them, but also to protect against what it saw as the real danger of serious depletion or even extinction of those resources by increasingly large and sophisticated foreign fishing armadas. Second, the lawmakers clearly thought it highly unlike-

20. Also noteworthy are the views of the Commandant of the Coast Guard, which bears the primary enforcement responsibility, who listed some of the relevant considerations in determining whether a particular offending vessel will be seized: "Among the factors which guide the exercise of discretion in pursuing a particular case are these: (1) was the offense intentional; . . .." Letter from Adm. Chester R. Bender to Rep. Thomas M. Pelly, *quoted in* Fidell, Ten Years under the Bartlett Act: A Status Report on the Prohibition on Foreign Fishing, 54 Boston U.L.Rev. 703, 735 (1974).

ly that purely innocent violations would occur. Third, Congress was most concerned that the Act be "effectively and strictly enforced," *id.* at 4664, but it also desired to make available a wide range of punishments so that the sentences imposed could both serve as an effective deterrent and reflect any mitigating circumstances. Finally, while an intent to impose absolute liability does not *conclusively* appear, there is persuasive evidence to that effect, and we find no persuasive indications in the legislative history of an intent to require some form of mens rea. Moreover, it is appropriate to note that prosecutions under section 1081 would be extremely difficult if the government had to prove willfulness or even negligence.[21] Balanced against Con-

21. One commentator who made a comprehensive study of the Act and the history of its enforcement concluded that it was designed to reach innocent as well as willful violations. He also noted that "only rarely has there been evidence to suggest that a particular violation was in fact intentional. If enforcement of the Act is to be feasible, a showing that a violation was deliberate cannot be required. Lack of intent is, however, an appropriate consideration in deciding whether to prosecute and in recommending a disposition." Fidell, Ten

gress's obvious concern and desire for strict enforcement, this is a factor to consider.

The standard imposed by section 1081 is beyond doubt a reasonable one; adherence thereto occasions no undue burden. In this day of inter-planetary travel, some 250 years after invention of the sextant, it can hardly be labeled unreasonable to expect and require a ship's captain to know where he is, and there is no question concerning the propriety of forbidding foreign vessels from fishing within twelve miles of our shores.

The penalties specified in section 1082, while not insubstantial, are not so great as to indicate that Congress must have intended that some mens rea be an element of the offense. Appellant urges the proposition that no statute carrying a sanction of up to

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Years under the Bartlett Act: A Status Report on the Prohibition on Foreign Fishing, 54 Boston U.L.Rev. 703, 736–37 (1974) (footnotes omitted).

The author relates some instances of apparently innocent violations. In one case involving a Bulgarian vessel, the captain, who was prosecuted and fined $20,000, was asleep in his cabin when the violation occurred. *Id.* at 735 n. 178. In another, a Soviet vessel was allowed to depart without seizure because its navigational charts failed to disclose American-owned rocks from which the zone is measured. *Id.* at 737 n. 190. Another Soviet ship was not so fortunate. Its navigational gear erroneously led the captain to believe he was fishing lawfully; this apparently was taken into account in assessing the penalty, which, nonetheless, was substantial: a civil settlement for $225,000 and a $25,000 fine against the master. *Id.*

one year imprisonment could constitutionally rest upon a strict liability theory. The decisions upholding statutes with one or more strict liability elements and having potential penalties equal to or greater than section 1082 amply refute that contention.[22] Nor can we accept appellant's argument that "the nature of the offense invites moral stigma." A conviction for fishing within twelve miles of the United States simply will not "gravely besmirch," *Holdridge, supra* at 310, or do "grave damage to an offender's reputation," *Morissette, supra* 342 U.S. at 256, 72 S.Ct. at 246, 96 L.Ed. at 297.

[3] Appellant asserts that the crime created by section 1081 is essentially one "taken over from the common law," *Holdridge, supra* at 310, because of its purported similarity to the common-law crimes of criminal trespass and poaching. We find this argument unpersuasive. The act of fishing is not inherently illegal, nor has the fact of a foreign ship's presence within a certain distance of our coast ever been viewed as

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22. *E. g., United States v. Freed*, 401 U.S. 601, 91 S.Ct. 1112, 28 L.Ed.2d 356 (1971) (possession of unregistered firearm; $10,000 or ten years or both); *Williams v. North Carolina*, 352 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577 (1945) (bigamy; ten years); *United States v. Dotterweich*, 320 U.S. 277, 64 S.Ct. 134, 88 L.Ed. 48 (1943) (misbranded or adulterated drugs; $1000 and/or one year for first offense, $10,000 and/or three years for subsequent offense); *United States v. Balint*, 258 U.S. 250, 42 S.Ct. 301, 66 L.Ed. 604 (1922) (unlawful drug sale; five years).

wrong in itself. Prior to 1964, in fact, there was some doubt that it was illegal for a foreign ship to be both present within our territorial waters and engaging in fishing. *See* House Comm. on Merchant Marine and Fisheries, H.R.Rep.No.1356, 88th Cong., 2d Sess. (1964), reprinted in 1964 U.S.Code Cong. & Admin.News, p. 2183. The statute is not based on any common-law offense, but is a regulatory measure designed to protect both our commercial fishing industry and our marine wildlife; it is typical malum prohibitum offense. *See Pena-Cabanillas v. United States*, 394 F.2d 785 (9th Cir. 1968).

Finally, appellant argues that the Supreme Court's recent decision in *United States v. Park*, 421 U.S. 658, 95 S.Ct. 1903, 44 L.Ed.2d 489 (1975), supports his contention that culpability in the form of negligence is a minimum constitutional requirement before criminal liability can attach. In *Park*, the Court addressed the standard of liability of corporate officers under section 301 of the Food, Drug, and Cosmetic Act, 21 U.S.C. § 331, as construed in *United States v. Dotterweich*, 320 U.S. 277, 64 S.Ct. 134, 88 L.Ed. 48 (1943). *Dotterweich* held that corporate officials, as well as a corporation itself, could be prosecuted under the Act. The Court concluded that an individual could be found guilty even "though consciousness of wrongdoing be totally wanting." *Id.* at 284, 64 S.Ct. at 138, 88 L.Ed. at 53. The Court was aware of concern that the Act "might operate too harshly by

sweeping within its condemnation any person however remotely entangled in the [offense]." *Id.* It concluded that "[t]he offense is committed . . . by all who . . . have . . . a responsible share in the furtherance of the transaction which the statute outlaws . . . ." *Id.*

In the *Park* case, the Court of Appeals reversed a conviction under the Act, in part on the ground that due process required proof of some type of wrongful act of commission or omission as an element of the offense, and the trial judge's instructions "might well have left the jury with the erroneous impression that Park could be found guilty in the absence of 'wrongful action' on his part." *United States v. Park*, 499 F.2d 839, 841–42 (4th Cir. 1974).

The Supreme Court reversed. Focusing on the "responsible share" language of *Dotterweich*, the Court approved the construction of the courts of appeals "that those corporate agents vested with the *responsibility*, and *power* commensurate with that responsibility, to devise whatever measures are necessary to ensure compliance with the Act bear a 'responsible relationship' to, or have a 'responsible share' in, violations." 421 U.S. at 672, 95 S.Ct. at 1911, 44 L.Ed.2d at 500–01 (footnote omitted; emphasis added). It concluded, "We are satisfied that the Act imposes the highest standard of care and permits conviction of responsible corporate officials who, in light of this standard of care, have the *power to prevent or correct* violations of its provisions." *Id.* 421

U.S. at 676, 95 S.Ct. at 1914, 44 L.Ed.2d at 503 (emphasis added).

Appellant interprets the Supreme Court's holding to mean that the government must prove negligence to sustain a conviction,[23] and argues that due process requires at least as much in the instant case. A holding that section 1081 does not require a showing of negligence, however, in no way conflicts with *Park*. The conclusion reached by the Court in *Dotterweich* and *Park* was in a sense dictated by the nature of the enterprises at which the Food, Drug, and Cosmetic Act is aimed. Defendant Park was the president of a national retail food chain employing approximately 36,000 people, and operating 874 retail outlets, twelve general warehouses, and four special warehouses. Such a position is hardly analogous to that of the master of a fishing

23. This is also the interpretation of the dissenting justices:

> As I understand the Court's opinion, it holds that in order to sustain a conviction . . . the prosecution must at least show that by reason of an individual's corporate position and responsibilities, he had a duty to use care to maintain the physical integrity of the corporation's food products. A jury may then draw the inference that when the food is found to be in such condition as to violate the statute's prohibitions, that condition was "caused" by a breach of the standard of care imposed upon the responsible official. This is the language of negligence, and I agree with it.

421 U.S. at 678, 95 S.Ct. at 1915, 44 L.Ed.2d at 505 (Stewart, J., joined by Marshall and Powell, JJ., dissenting).

vessel. It is not at all certain that an official of such a corporation has the *power* to prevent violations *merely* by virtue of his position. Therefore, a holding that criminal liability could attach solely upon proof that the corporation committed a violation and the defendant was an officer of the offending corporation would indeed have grave due process implications. A ship's master, on the other hand, has virtually plenary authority over his vessel and her crew. Therefore, proof that a defendant is the "master or other person in charge of" a fishing vessel necessarily also establishes that he had the authority and responsibility to insure compliance with the law.[24]

[4] Based on the foregoing considerations, we conclude that proof of culpability or fault was neither statutorily nor constitutionally necessary to sustain Ayo's convic-

24. This conclusion is not affected by the group structure of the Cubans' fishing operation. It is not clear from the record what authority, if any, the flotilla commander or the mother ship exercised over the other vessels. But in any event, it is clear that Ayo was acting on his own when the violation occurred. Defense counsel questioned Ayo about his separation from the mother ship:

> Q And at 1:00 what did the mother ship communicate to you?
> A She told me that fishing was very poor, it was pretty bad.
> Q And did you and the mother ship discuss what should be done?
> A Yes.
> Q And did the mother ship indicate to you what you should do now?
> A No. I told her what I was going to do.

tion. In the forfeiture action, appellant urges reversal on the mens rea issue under the same statutory and constitutional rationale, and we reach the same conclusion. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974); *United States v. One (1) 1972 Wood, 19 Foot Custom Boat*, 501 F.2d 1327 (5th Cir. 1974). The elements of a section 1082(b) forfeiture action are the same as those of a section 1082(a) criminal action, except, of course, there is no issue of the identity of the master since the proceeding is one in rem. All elements were proved beyond a reasonable doubt.

AFFIRMED.

Appendix B

Judgments of Affirmance

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 75-3297

D. C. Docket No. CR-75-H-177

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERTO AYO-GONZALEZ,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

Before:

GEWIN, GODBOLD and SIMPSON, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

August 6, 1976

Issued as Mandate: August 30, 1976

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 75-3873

D. C. CA 75-H-1394

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

CUBAN VESSEL F-V E-82-HB, her engines, etc., *in rem*, et al.,

Defendant-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

Before:

GEWIN, GODBOLD and SIMPSON, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

August 6, 1976

Issued as Mandate: August 30, 1976.

Appendix C

District Court's Judgment of Guilt

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF TEXAS

United States of America vs.

DEFENDANT:

ROBERTO AYO-GONZALEZ

Docket No.: Cr. 75-H-177

JUDGMENT AND PROBATION COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date—8/14/75

COUNSEL:

With Counsel: Michael Krinsky

PLEA:

NOT GUILTY

There being a finding: GUILTY.

FINDING AND JUDGMENT:

Defendant has been convicted as charged of the offense(s) of fishing in fishery zone contiguous to territorial waters of the United States, in violation of Title 16, United States Code, Sections 1091, 1081 and 1082(a), as charged by Criminal Information.

Appendix C

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that:

SENTENCE OR PROBATION ORDER:

Imposition of sentence, is hereby suspended and the defendant is placed on probation, without supervision, for a period of ONE (1) YEAR; said probation is conditioned upon the following: (1) that the defendant not engage in commercial fishing for a period of one (1) year; and, (2) that the defendant not enter into the territorial limits of the United States.

ADDITIONAL CONDITIONS OF PROBATION:

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

APPROVED:

Robert A. Berg

SIGNED BY:

U.S. District Judge: John V. Singleton, Jr.

Date: 8/22/75

Appendix D

District Court's Judgment of Forfeiture, and Related Findings of Fact and Conclusions of Law

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

CIVIL ACTION No. 75-H-1394

UNITED STATES OF AMERICA

v.

F-V E-82-HB, Her Engines, Tackle, Appurtenances, Cargo, etc., *in rem*

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is an action by the United States seeking forfeiture of a vessel pursuant to 16 U.S.C. § 1082. The United States asserts a violation of 16 U.S.C. § 1081. Finding jurisdiction proper, this court held a trial that commenced on August 13, 1975, and terminated on August 14, 1975.

Findings of Fact

1. The fishing vessel E-82-HB is a shrimp boat approximately eighty-two (82) feet in length which on August 2, 1975, was operated by the Cuban government with a master and crew of that nationality.

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2. During the early morning hours of August 2, 1975, United Statest Coast Guard Point Baker was conducting a fisheries patrol in the vicinity of St. Joseph Island, Texas, off the Texas coast. Shortly before 5:00 a.m. on that date, personnel from the crew of Point Baker and the National Fisheries Service on board the Point Baker, observed the E-82-HB with her nets out conducting shrimping operations.

3. At approximately 5:07 a.m. Lieutenant Robert North, on-scene-commander and navigation officer, obtained an accurate navigation fix on the position of the Point Baker, which at that time was within approximately seventy-five (75) to one hundred (100) yards of E-82-HB.

4. At approximately 5:07 a.m. Lieutenant North, using radar and the fathometer, placed the position of Point Baker at a point approximately 7.5 miles from the mean low water line of St. Joseph Island, Texas. This position was determined by using a range finder to Port Aransas, Texas, a radar range to the shore of St. Joseph Island, and a sounding. A range to Port Aransas was 24,000 yards, the range to St. Joseph Island was 15,100 yards and the sounding was 10 fathoms, and the position was determined 24° 54.5′ N, and 96° 50.5′ W.

5. Special Agent E. W. Velasco, National Marine Fisheries Agent, hailed the Cuban vessel on three occasions to stop and the E-82-HB anchored at 5:24 a.m., at which time Lieutenant North, using the radar range of 25,900 yards to Port Aransas, Texas, and 16,500 yards to St. Joseph Island, and a sounding of 10 fathoms, determined the position of the Point Baker to be 27° 53.75′ N and 96°

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49.5′ W, or approximately 8¼ miles from the nearest land of St. Joseph Island.

Prior to Cuban vessel E-82-HB's stopping and anchoring, the Cuban captain returned hail to Agent Velasco that he could not stop his vessel until he had recovered all his nets, which were out at the time. When the nets were taken out of the water, Agent Velasco and Lieutenant North noticed the nets on the starboard side of E-82-HB had marine life in them and the cargo was dumped onto the deck of the Cuban vessel.

Conclusions of Law

1. The Cuban fishing vessel E-82-HB is the property of the Cuban government or some agency or entity owned by or domiciled in the Cuban nation. As such it is not a vessel of the United States within the meaning of Title 16, United States Code, Subsection 1081, and it was unlawful for such vessel to conduct or engage in fisheries or fishing within a fisheries zone of the United States as described by Title 16, United States Code, Sections 1081 and 1091.

2. At approximately 5:07 a.m. on August 2, 1975, the E-82-HB was engaging in fishing and fisheries within a fisheries zone of the United States in violation of Title 16, United States Code, Subsection 1081 and is subject to forfeiture to the United States along with its tackle, apparel, furniture, appurtenances, cargo and stores under the provisions of Title 16, United States Code, Section 1082, Subsection B.

3. The fisheries zone contiguous to the territorial sea of the United States is established by the provisions of Subsection 1091, Title 16, United States Code. Its boundaries

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run from the seaward side three-mile limit, which is computed from the line of mean low water, to a distance of nine nautical miles to seaward of the three-mile limit. The fishing described in the foregoing conclusion was within such fisheries zone and was in violation of Title 16, United States Code, Subsection 1081, 1082, and 1091.

4. The Cuban fishing vessel E-82-HB is subject to forfeiture to the United States of America and shall be forfeited by a judgment entered in this court to that respect.

DONE at Houston, Texas, on this 10th day of September, 1975.

/s/ JOHN V. SINGLETON, JR.
United States District Judge

CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

FILED

SEP 10 1975

V. BAILEY THOMAS, CLERK

BY DEPUTY: R. MULLINS

Appendix D

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

CIVIL ACTION NO. 75-H-1394

UNITED STATES OF AMERICA

V.

F-V E-82-HB, Her Engines, Tackle, Appurtenances, Cargo, etc., *in rem*

FINAL JUDGMENT

On the basis of the Findings of Fact and Conclusions of Law entered by this court, it is hereby ORDERED, ADJUDGED, and DECREED that the Cuban Fishing Vessel E-82-HB, her engines, tackle, appurtenances, cargo and apparel, be and the same is hereby forfeited to the United States of America under the provision of Title 16, United States Code, Section 1082, Subsection B, and the United States Marshal is hereby ORDERED to deliver such vessel to the representative, the United States Coast Guard. Costs of these proceedings are assessed against the vessel.

Appendix D

DONE at Houston, Texas, on this 10th day of September, 1975.

/s/ JOHN V. SINGLETON, JR.
United States District Judge

CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

FILED

SEP 10 1975

V. BAILEY THOMAS, Clerk

By DEPUTY: R. MULLINS

Appendix E

Statutory Provisions

16 U.S.C. § 1081. Prohibition against fishing in territorial waters; exceptions

It is unlawful for any vessel, except a vessel of the United States, or for any master or other person in charge of such a vessel, to engage in the fisheries within the territorial waters of the United States, its territories and possessions and the Commonwealth of Puerto Rico, or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters or in such waters to engage in activities in support of a foreign fishery fleet or to engage in the taking of any Continental Shelf fishery resource which appertains to the United States except as provided in this chapter or as expressly provided by an international agreement to which the United States is a party. However, sixty days after written notice to the President of the Senate and the Speaker of the House of Representatives of intent to do so, the Secretary of the Treasury may authorize a vessel other than a vessel of the United States to engage in fishing for designated species within the territorial waters of the United States or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters or for resources of the Continental Shelf which appertain to the United States upon certification by the Secretaries of State and of Commerce that such permission would be in the national interest and upon concurrence of any State, Commonwealth, territory, or possession directly affected. The authorization in this section may be granted only after a finding by the Secretary of Commerce that the country of registry, documentation,

or licensing extends substantially the same fishing privileges for a fishery to vessels of the United States. Notwithstanding any other provision of law, the Secretary of State, with the concurrence of the Secretaries of the Treasury and of Commerce, may permit a vessel, other than a vessel of the United States, owned or operated by an international organization of which the United States is a member, to engage in fishery research within the territorial waters of the United States or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters, or for resources of the Continental Shelf which appertain to the United States and to land its catch in a port of the United States in accordance with such conditions as the Secretary may prescribe whenever they determine such action is in the national interest.

16 U.S.C. § 1082. Violations and penalties; seizure, forfeiture, and condemnation

(a) Any person violating the provisions of this chapter shall be fined not more than $100,000, or imprisoned not more than one year, or both.

(b) Every vessel employed in any manner in connection with a violation of this chapter including its tackle, apparel, furniture, appurtenances, cargo, and stores shall be subject to forfeiture and all fish taken or retained in violation of this chapter or the monetary value thereof shall be forfeited. For the purposes of this chapter, it shall be a rebuttable presumption that all fish found aboard a vessel seized in connection with such violation of this chapter were taken or retained in violation of this chapter.

(c) All provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of a vessel, including its tackle, apparel, furniture, appurtenances, cargo, and stores for violation of the customs laws, the disposition of such vessel, including its tackle, apparel, furniture, appurtenances, cargo, and stores or the proceeds from the sale thereof, and the remission or mitigation of such forfeitures shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this chapter, insofar as such provisions of law are applicable and not inconsistent with the provisions of this chapter.

16 U.S.C. § 1091. Establishment; fisheries rights

There is established a fisheries zone contiguous to the territorial sea of the United States. The United States will exercise the same exclusive rights in respect to fisheries in the zone as it has in its territorial sea, subject to the continuation of traditional fishing by foreign states within this zone as may be recognized by the United States.

16 U.S.C. § 1092. Description of boundaries

The fisheries zone has as its inner boundary the outer limits of the territorial sea and as its seaward boundary a line drawn so that each point on the line is nine nautical miles from the nearest point in the inner boundary.